

SUNNY BROOK

41 P 105759

FINAL ORDER

APPEALED

TO

DISTRICT COURT

CASE # 105759

Chuck

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
41P-105759 BY SUNNY BROOK COLONY)

FINAL ORDER

* * * * *

The Proposal for Decision (Proposal) in this matter was entered on February 12, 2001. Applicant filed timely exceptions to the Proposal and requested an oral argument hearing on the exceptions. Objector Montana Department of Fish, Wildlife & Parks filed a Response to Applicant's Exceptions and a Motion to Include Response in Record. An oral argument hearing was held April 26, 2001, in Helena, Montana.

The Proposal recommended granting a Beneficial Water Use Permit to appropriate 7200 gpm up to 2622.18 acre-feet from the Marias River for irrigation. The Proposal places a condition on the appropriation limiting it to times when flows in the source are sufficient to satisfy all existing water rights (including the 488.5 cfs in the reserved water right of the Department of Fish, Wildlife and Parks), plus an additional amount of instream flow water. This additional instream flow was the difference between 560 cfs and 488.5 cfs, i.e., 71.5 cfs. The flow of 560 cfs was identified in the environmental assessment on this application as the preferred instream flow rate for maintenance of fisheries in the source. The Proposal for Decision bases this condition on Conclusion of Law 3. Conclusion of Law 3 states:

The Department may approve an application subject to appropriate modification and conditions resulting from the analysis in the EA and analysis of public comment. Mont. Admin. R. 36.2.523 (2)(b) and (d), 36.2.526 (6)(c) (1988); Kilpatrick v. Vincent (No. BDV-93-637, First Judicial District, Lewis and Clark County) (1993). (See Memorandum below.)

Applicant contests the protection for the amount of instream flow of water in excess of the 488.5 cfs in the reserved water right of the Department of Fish, Wildlife and Parks. They also assert that there was insufficient evidence in the record to substantiate the finding on the amount of water to meet the biological needs of the fishery resource in the source.

The logic of the conclusion, as explained in the cited Memorandum, relies on the Department rule and Kilpatrick in the context of the legislature's policy statement at the beginning of the Water Use Act, i.e.,

Mont. Code Ann. 85-2-101(3). The context here, however, is the entire Water Use Act ("WUA"). The legislature has provided a system of provisions in the WUA to carry out the policy statement with respect to securing water for the benefit of the state's fishery resources. The legislature has established that water use for fisheries is a beneficial use under Mont. Code Ann. 85-2-102(2)(a)&(c). The legislature has created several mechanisms within the WUA to explicitly protect instream flows of water used to benefit fisheries resources. These include: 1) state reservation of water under 85-2-316 by the Department of Fish, Wildlife, and Parks for up to 50% of the average annual flow of record on gauged streams; 2) water right leases by the Department of Fish, Wildlife, and Parks, without limitation as to amount, under 85-2-436; and, 3) temporary changes of any water right for instream flows without limitation as to entity or amount under 85-2-408. It is clear from the progression of adoption of these provisions, typically after extensive negotiation and deliberation, that they constitute the exclusive mechanisms for such protection in the context of the WUA.

The Department rule for treatment of environmental assessments [Mont. Admin. R. 36.2.523(2)], such as the one conducted on this application, is discretionary. The rule should not be used to condition an action in a manner that circumvents, overrides, or duplicates a statutory mechanism. For instance, as a result of information obtained through the environmental analysis, a beneficial water use permit should not be conditioned in such a way as to duplicate or overlay a Montana Pollution Discharge Elimination System Permit under the Montana Clean Water Act. In the case at hand, the rule was interpreted and applied with the effect that it circumvents the mechanisms provided by the legislature for protection of instream flows of water for the benefit of fisheries resources.

The 2001 Montana Legislature passed and the Governor signed House Bill 473 (Ch. 268, L. 2001). House Bill 473 confirms the need for the agency to focus close attention on and limit itself to the specific statutes that govern water rights for the mechanisms it uses to address issues.

Conclusions of Law 3 and 4 in the Proposal for Decision in this matter are a misinterpretation and misapplication of Mont. Admin. R. 36.2.523 (1988). An agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the Proposal for Decision. Mont. Code Ann. §2-4-621(3) (1999). The Conclusions of Law in the Proposal for

Decision are revised as follows. Conclusion of Law 3 is deleted in its entirety. Conclusion of Law 4 is revised to read:

Applicant has met, or there are conditions which can satisfy, the criteria for issuance of a beneficial water use permit. Mont. Code Ann. §85-2-311 (1999).

Hence, Condition B in the Proposed Order is revised to protect the instream flows for fisheries as established in the reserved water right of the Montana Department of Fish, Wildlife and Parks, i.e., 488.5 cfs.

Because Conclusions of Law 3 and 4 have been modified as stated above, the additional exceptions submitted by the applicant are moot, and need not be addressed in this order.

THEREFORE, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law with the modifications made above, and incorporates them by reference.

Based on the record in this matter, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41P-105759 is issued to Sunny Brook Colony to appropriate 7200 gpm up to 2622.18 acre-feet from the Marias River at a point in Government Lot 10 within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6, Township 28 North, Range 9 East, Chouteau County, Montana. The means of diversion is 5 pumps located and manifolded at the point of diversion. The period of appropriation is from April 15 through September 30th, inclusive, of each year. The purpose of use is irrigation on 957 acres. The place of use is 105 acres in the SE $\frac{1}{4}$ of Section 12, 125 acres in the SW $\frac{1}{4}$ of Section 12, 125 acres in the NE $\frac{1}{4}$ of Section 13, 129 acres in the NW $\frac{1}{4}$ of Section 13, 72 acres in the SE $\frac{1}{4}$ of Section 13, 28 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 13, 131 acres in the NE $\frac{1}{4}$ of Section 14, 54 acres in the SE $\frac{1}{4}$ of Section 14, 84 acres in the SW $\frac{1}{4}$ of Section 14, all in Township 28 North, Range 8 East; 104 acres in the NW $\frac{1}{4}$ of Section 18, Township 28 North, Range 9 East, all in Chouteau County, Montana. The water will be diverted to a 10 acre-foot capacity off stream settling and storage reservoir located in the

NE~~1~~NE~~1~~SW~~1~~ and the NW~~1~~NW~~1~~SE~~1~~ of Section 12, Township 28 North, Range 8 East, Chouteau County, Montana.

A. The appropriator shall install a Department approved water use measuring device at a point approved by the Department that will measure all waters diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written daily record of the flow rate and volume of all water diverted including the period of time. Records shall be submitted by November 30th of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the Havre Water Resources Division Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

B. Permittee may divert only the excess flow above the following USGS gage flows at gage number 06101500 on the Marias River near Chester, Mt: April, 508.5 cfs; May, 538.5 cfs; June, 558.5 cfs; July, 588.5 cfs; August, 568.5 cfs; September, 538.5 cfs until such time as a flow gage is installed at the mouth of the Marias River. Thereafter Permittee may divert when such gage flows at the mouth exceed 488.5 cfs.

C. When the Conservation Districts perfect any or all of their Marias River state reservation below Tiber Dam, Permittee must increase the cut-off flows in Condition B above by the amount perfected. Perfected means the highest daily measurement recorded by the reservant as required by the Reservation Order (See Missouri River Basin Final Order Establishing Water Reservations Above Fort Peck Dam at 361 (1992) (Montana Board of Natural Resources and Conservation).

D. The five (5) main diversion pump facility must be designed by a licensed professional engineer and have individual pump shut-off controls to allow individual pump shut down.

E. The pump intakes must be designed by a licensed professional engineer and be screened such that the maximum screen opening size does not exceed 0.1 inches, the screen intake velocities do not exceed 0.5 feet per second, the screens contain an internal baffling system to balance intake velocities over the screen area, and the screens are placed as close to the water surface as possible.

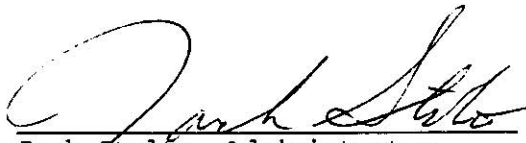
F. Project construction must be supervised by a licensed professional engineer and be scheduled when streamflow is low, and the soil is dry. Disturbed streambanks and slopes must be re-contoured to their original configuration, and re-seeded with native plants or cover crop species.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this 23rd day of May, 2001.



Jack Stults, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 23 day of May, 2001:

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BIG SANDY MT 59520

GREG DUNCAN
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DEPT OF FISH, WILDLIFE & PARKS
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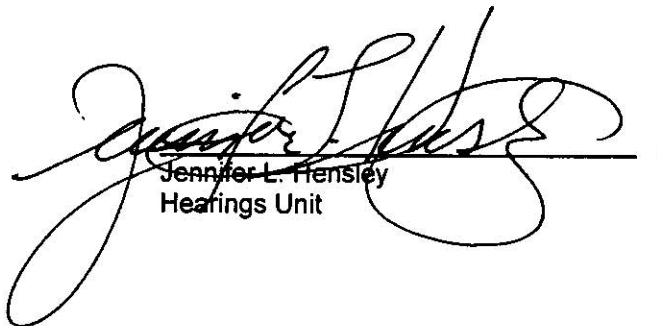
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Jennifer L. Hensley
Hearings Unit

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Chuck

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

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|--|----------|
| IN THE MATTER OF THE APPLICATION FOR) | PROPOSAL |
| BENEFICIAL WATER USE PERMIT 41P-) | FOR |
| 105759 BY SUNNY BROOK COLONY) | DECISION |

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on October 11, 2000, in Fort Benton, Montana, to determine whether a beneficial water use permit should be issued to Sunny Brook Colony for the above application under the criteria set forth in Mont. Code Ann. §85-2-311 (1999).

APPEARANCES

Applicant appeared at the hearing by and through counsel Greg Duncan. David M. Schmidt, Senior Water Rights Specialist, Water Right Solutions, appeared as a witness for the Applicant.

Objector John Bold appeared at the hearing in person. Objector Lawrence and Mary Bold appeared at the hearing through their son John Bold.

Objector Bessette Ranch Co. appeared by and through counsel Stuart Lewin. Calvin Danreuther appeared as a witness for Objector Bessette Ranch Co.

Objector Montana Fish, Wildlife & Parks (DFWP) appeared at the hearing by and through counsel Rebecca J. Dockter Engstrom. Kathleen Williams, DFWP Water Resources Program Manager, and Bill Gardner, Fisheries Biologist, DFWP, were called as witnesses by Objector DFWP.

Untimely Objector Loma County Water and Sewer District made an appearance at the hearing through James Cornell, Manager/Operator.

Dixie Brough, Water Resources Specialist with the Havre Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Applicant.

EXHIBITS

Applicant offered seven exhibits for the record. The Hearing Examiner accepted Applicant's Exhibits 1 and 3-7.

Applicant's Exhibit 1 is a copy of the *SUNNY BROOK COLONY IRRIGATION PROJECT DRAFT ENVIRONMENTAL ASSESSMENT*, DNRC, August 2000. It is a part of the department file.

Applicant's Exhibit 2 is a copy of the *SUNNY BROOK COLONY IRRIGATION PROJECT FINAL ENVIRONMENTAL ASSESSMENT*, DNRC, October 2000. This exhibit's official designation as A2 was withdrawn when it was acknowledged to be a part of the official department file. It was thereafter referred to as the October 2000 Environmental Assessment.

Applicant's Exhibit 3 is a computer generated map showing the relative location of the parties.

Applicant's Exhibit 4 is a computer generated reproduction of a USGS quadrangle map upon which the point of diversion, conveyance pipelines, and place of use are shown.

Applicant's Exhibit 5 is 3 pages from the United States Bureau of Reclamation website showing the *Current Reservoir Data for Lake Elwell as of 03/28/2000*, *Tiber Reservoir Allocations*, and *CONSTRUCTION OF THE LOWER MARIAS UNIT - TIBER DAM AND RESERVOIR*.

Applicant's Exhibit 6 is a copy of the Department raw data showing the monthly average and percentile flows for the Marias River near Chester for the period 1980-1999.

Applicant's Exhibit 7 is a one page copy of the Marias River Basin, USGS Water Resources Data for Montana showing daily mean discharge values for October 1997 through September 1998, and statistics of monthly mean data for water years 1921 -1998. The monthly mean flow is highlighted.

Objectors offered no exhibits for the record.

PRELIMINARY MATTERS

Objector C. Worrall & Sons, Inc. failed to appear at the hearing and are in default.

Applicant stated that Objector Blackfeet Tribe and Applicant are in the process of finalizing an agreement to settle the Tribe's

objection. Applicant further stated the Tribe did not appear at the hearing because of the pending agreement; they did not want their non-appearance to place them in default. Objector Blackfeet Tribe is excused from the hearing.

Applicant said the Tribe may withdraw a report submitted with their discovery response after the agreement is finalized. Possible withdrawal brought objection by Objector Bessette Ranch Co. stating they may want to rely upon portions of the report and like to have it in the record. The report is not part of the record because it was not introduced by a party.

The Hearings Examiner sustained Applicant's objection to participation by untimely Objector Loma County Water and Sewer District.

At the beginning of the hearing, the parties stipulated that the applicant has a possessory interest in the proposed place of use.

At the hearing the Department file copy of its *SUNNY BROOK COLONY IRRIGATION PROJECT DRAFT ENVIRONMENTAL ASSESSMENT, AUGUST 2000* (hereafter Draft EA), and a petition received by the Department subsequent to the release of the Draft EA were not available. A copy of the Draft EA brought by a party was used for reference during witness testimony. The Hearings Examiner has placed photo copies of the *SUNNY BROOK COLONY IRRIGATION PROJECT DRAFT ENVIRONMENTAL ASSESSMENT, AUGUST 2000* and subsequent petition in the Department file.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 41P-105759 in the name of and signed by Sunny Brook Colony was filed with the Department on September 22, 1999. (Department file)
2. The Draft EA, subsequent petition, and *SUNNY BROOK COLONY IRRIGATION PROJECT FINAL ENVIRONMENTAL ASSESSMENT, DNRC, October 2000*

(hereafter Final EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.

3. Applicant seeks to appropriate 7200 gallons per minute (hereafter gpm) up to 2622.18 acre-feet from the Marias River at a point in Government Lot 10 within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6, Township 28 North, Range 9 East, Chouteau County, Montana. The proposed means of diversion is 5 pumps located and manifolded at the point of diversion.

The proposed period of appropriation is from April 15 through September 30th, inclusive, of each year. The proposed use is for irrigation on 957 acres. The proposed place of use is 105 acres in the SE $\frac{1}{4}$ of Section 12, 125 acres in the SW $\frac{1}{4}$ of Section 12, 125 acres in the NE $\frac{1}{4}$ of Section 13, 129 acres in the NW $\frac{1}{4}$ of Section 13, 72 acres in the SE $\frac{1}{4}$ of Section 13, 28 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 13, 131 acres in the NE $\frac{1}{4}$ of Section 14, 54 acres in the SE $\frac{1}{4}$ of Section 14, 84 acres in the SW $\frac{1}{4}$ of Section 14, all in Township 28 North, Range 8 East; 104 acres in the NW $\frac{1}{4}$ of Section 18, Township 28 North, Range 9 East, all in Chouteau County, Montana. The water will be diverted to a 10 acre-foot capacity off stream settling and storage reservoir located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, Township 28 North, Range 8 East, Chouteau County, Montana. (Department file, testimony of David Schmidt)

4. Applicant has proven water is physically available. There is no stream data at the proposed point of diversion or at the mouth of the Marias River. Applicant took published mean monthly flow data from the nearest upstream river gage (number 06101500, located below Tiber Dam [hereafter, Tiber gage]), and then subtracted flow rates of existing water rights of record below the Tiber gage and above the proposed point of diversion. The rights subtracted were adjusted to remove possible duplicate rights and reduce possible exaggerated rights, and then added the largest Department of Fish, Wildlife, & Parks water Reservation in the reach downstream of Tiber Dam to the mouth of the Marias River. This shows what water is available at the proposed point of diversion. The lowest monthly mean during the period of use is 852 cubic feet per second (hereafter cfs). The sum of existing rights in the Department records is 558.6 cfs.

Subtracting 278.9 cfs for duplicate or exaggerated Statement of Claims For Existing Water Rights, adding 488.5 cfs for DFWP's reservation and 16 cfs for the pending application shows 784.2 cfs must be subtracted from the Tiber gage flow to show physical availability at the point of diversion.

Tiber Dam regulates flows below the dam and separates the upper Marias River basin from the lower basin. There are water reservations for future irrigation from the Marias River upstream of Tiber Dam totaling 31.2 cfs and un-quantified Blackfeet Tribal reserved rights.

The basin below the dam is the portion affected by the pending application. There are water reservations for future irrigation from the Marias River below Tiber Dam totaling 20.3 cfs. Adding the amount reserved for use below Tiber Dam (20.3 cfs) to that required at the Tiber gage (above) to show physical availability increases the total to 804.5 cfs. This flow amount is less than the monthly mean flows of record for the proposed period of use. This methodology is reasonable to show water is physically available at the point of diversion.

(Department file, testimony of Dave Schmidt, John Bold, Dixie Brough)

5. Applicant has proven water is legally available. Applicant used the same methodology to show legal availability that was used for physically availability except the appropriations downstream of the Applicant of 17.55 cfs were included in the flows subtracted from the Tiber gage flows. Applicant stated that one or all of Applicant's diversion pumps could be shut off in the event of a call on the source. Increasing the amount appropriated between Tiber Dam and Applicant's point of diversion (804.5 cfs) by 17.55 cfs brings the total to 822.05 cfs to meet existing needs and Applicant's project. Subtracting this flow (822.05 cfs) from the lowest median monthly flow at the Tiber gage (852 cfs) shows 29.95 cfs is available using this methodology. (Department file, testimony of Dave Schmidt, Dixie Brough)

6. Applicant has proven there would be no adverse effect to the water rights of prior appropriators under an existing water right, certificate, permit, or state water reservation when the diversion pumps can be shut down when water becomes unavailable, Applicant

measures the flow diverted, the ability to divert is tied to a cut-off flow at the Tiber gage, and the pump intakes are screened to prevent fish from entering the system. This Hearings Examiner does not understand how an upstream senior right could be adversely affected by a downstream junior diversion. Senior water users above Tiber Dam will not be adversely effected by this application.

Using monthly means to show lack of adverse affect was questioned by Objector DFWP because daily flows drop below the mean monthly flows. The Tiber gage flow records for water year 1998 confirm this.

Objector DFWP's concern is that fish may be adversely affected at flows below the identified biological demand (flows). DFWP's estimate of the biological flow requirements of the Marias River to maintain the aquatic environment are 560 cfs instead of the 488.5 cfs in the DFWP water reservation number 41A-72155. The methodology of determining the biological flow requirements of the lower Marias River for the protection of fish was not found at fault in the water reservation process, nor was it argued at this hearing. The DFWP water reservation was limited by statute to fifty percent of the mean annual flow, or 488.5 cfs. (See Missouri River Basin Final Order Establishing Water Reservations Above Fort Peck Dam at 119 (1992) (Montana Board of Natural Resources and Conservation). A flow at the Tiber gage below which Applicant could not divert (hereafter, cut-off flow) would prevent adverse effect and impact to existing rights below Tiber Dam.

Applicant and Objectors disagreed over which DFWP flow rate to use to determine the cut-off flow; the statutory 488.5 cfs flow rate of DFWP's reservation or the 560 cfs biological flow requirement. The Final EA used 560 cfs in its impact assessment because that document is used to assess potential impacts to the environment aside from statutory limitations on water rights. The Department of Fish, Wildlife and Parks' reservation number 41A-72155 flow reservation may be modified if a new technique more suitably and accurately determines the flow needs of the reservation. (See Missouri River Basin Final Order Establishing Water Reservations Above Fort Peck Dam at 362

(1992) (Montana Board of Natural Resources and Conservation) This Hearings Examiner agrees with the Final EA's use of the higher biological flow requirement number because impact to the environment occurs at the higher level, not at the lower water reservation rate which was limited by statute.

In addition to DFWP's state water reservation, adverse effect may occur to other existing appropriators. Department records show rights for 297.25 cfs below Tiber Dam. The Department measured less than 100 cfs difference between the Tiber gage and measured flow at the mouth of the Marias River. This estimates actual use below the Tiber gage upon which the Department relied to make the Final EA estimates of existing depletions of April, 20 cfs; May, 50 cfs; June, 70 cfs; July, 100 cfs; August, 80 cfs; September, 50 cfs. These amounts must be added to the 560 cfs identified above to prevent adverse effect to existing users.

The cut-off flow need not include the 20.3 cfs flows reserved for the Conservation Districts until they are perfected. When the Conservation Districts perfect any or all of their right, Applicant must increase the cut-off flow by the amount perfected. In this context perfected means the highest daily measurement recorded by the reservant as required by the reservation Final Order. (See Missouri River Basin Final Order Establishing Water Reservations Above Fort Peck Dam at 361 (1992) (Montana Board of Natural Resources and Conservation))

The system consists of nine (9) irrigation center pivots which can individually be shut down to reduce water used. The means of diversion is five pumps which can be shut down as needed to match available water. The total amount of water diverted must be measured to determine how many pumps must shut down to match water available. Water is available for use by the applicant without adverse effect when the Tiber gage flows exceed: April, 580 cfs; May, 610 cfs; June, 630 cfs; July, 660 cfs; August, 640 cfs; September, 610 cfs.

Objector DFWP's state water reservation 41A-72155 will be adversely effected if the pump intakes are not screened to prevent

fish entrainment at the diversion pumps. The Final EA states pump intake screening will mitigate impact from entrainment if the maximum screen opening size does not exceed 0.1 inches, screen intake velocities do not exceed 0.5 feet per second, screens contain an internal baffling system to balance intake velocities over the screen area, and the screens are placed as close to the water surface as possible. (Department file, Final EA, testimony of David Schmidt, Kathleen Williams, Bill Gardner, Memorandum [below])

7. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate when designed by a competent engineer so pipe pressures and velocities are not exceeded, and erosion is reduced. The Final EA states soil erosion can be reduced if construction is scheduled when streamflow is low, the soil is dry, streambanks and slopes are re-contoured to their original configuration, and seeded with native plants or cover crop species. When the pump intakes are screened as discussed in Finding of Fact 6, the impacts from operation of the diversion works are mitigated. (Department file, testimony of Dave Schmidt, Memorandum [below])

8. Applicant has proven the proposed use of water for irrigation is beneficial. Irrigation of crops is a beneficial use. The flow rate and volume are reasonable for the proposed crops. (Department file, testimony of Dave Schmidt, Dixie Brough)

9. Applicant has proven they have a possessory interest in the property where the water is to be put to beneficial use. (Department file)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 (1999).

2. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the

criteria for issuance of a beneficial water use permit. Mont. Code Ann. §85-2-312 (1999).

3. The Department may approve an application subject to appropriate modification and conditions resulting from the analysis in the EA and analysis of public comment. Mont. Admin. R. 36.2.523 (2)(b) and (d), 36.2.526 (6)(c) (1988); Kilpatrick v. Vincent (No. BDV-93-637, First Judicial District, Lewis and Clark County) (1993). (See Memorandum below)

4. Applicant has met the criteria for issuance of a beneficial water use permit with conditions that are appropriate taking into account the Final EA. See Findings of Fact 2, and 4 through 9. Mont. Code Ann. §85-2-311 (1999); Mont. Code Ann. §85-2-101(3) (1999).

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41P-105759 is issued to Sunny Brook Colony to appropriate 7200 gpm up to 2622.18 acre-feet from the Marias River at a point in Government Lot 10 within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6, Township 28 North, Range 9 East, Chouteau County, Montana. The means of diversion is 5 pumps located and manifolded at the point of diversion. The period of appropriation is from April 15 through September 30th, inclusive, of each year. The purpose of use is irrigation on 957 acres. The place of use is 105 acres in the SE $\frac{1}{4}$ of Section 12, 125 acres in the SW $\frac{1}{4}$ of Section 12, 125 acres in the NE $\frac{1}{4}$ of Section 13, 129 acres in the NW $\frac{1}{4}$ of Section 13, 72 acres in the SE $\frac{1}{4}$ of Section 13, 28 acres in the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 13, 131 acres in the NE $\frac{1}{4}$ of Section 14, 54 acres in the SE $\frac{1}{4}$ of Section 14, 84 acres in the SW $\frac{1}{4}$ of Section 14, all in Township 28 North, Range 8 East; 104 acres in the NW $\frac{1}{4}$ of Section 18, Township 28 North, Range 9 East, all in Chouteau County, Montana. The water will be diverted to a 10 acre-foot capacity off stream settling and storage reservoir located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, Township 28 North, Range 8 East, Chouteau County, Montana.

A. The appropriator shall install a Department approved water use measuring device at a point approved by the Department that will measure all waters diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written daily record of the flow rate and volume of all water diverted including the period of time. Records shall be submitted by November 30th of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the Havre Water Resources Division Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

B. Permittee may divert only the excess flow above the following USGS gage flows at gage number 06101500 on the Marias River near Chester, Mt: April, 580 cfs; May, 610 cfs; June, 630 cfs; July, 660 cfs; August, 640 cfs; September, 610 cfs until such time as a flow gage is installed at the mouth of the Marias River. Thereafter Permittee may divert when such gage flows at the mouth exceed 560 cfs.

The flow rate to be used in this condition shall be the lower of 560 cfs, or a lower flow rate determined by DFWP by a new technique to more suitably and accurately determine the biological flow needs of the fish.

C. When the Conservation Districts perfect any or all of their Marias River state reservation below Tiber Dam, Permittee must increase the cut-off flows in Condition B above by the amount perfected. Perfected means the highest daily measurement recorded by the reservant as required by the Reservation Order (See Missouri River Basin Final Order Establishing Water Reservations Above Fort Peck Dam at 361 (1992) (Montana Board of Natural Resources and Conservation)).

D. The five (5) main diversion pump facility must be designed by a licensed professional engineer and have individual pump shut-off controls to allow individual pump shut down.

E. The pump intakes must be designed by a licensed professional engineer and be screened such that the maximum screen opening size does not exceed 0.1 inches, the screen intake velocities do not exceed 0.5 feet per second, the screens contain an internal baffling system to balance intake velocities over the screen area, and the screens are placed as close to the water surface as possible.

F. Project construction must be supervised by a licensed professional engineer and be scheduled when streamflow is low, and the soil is dry. Disturbed streambanks and slopes must be re-contoured to their original configuration, and re-seeded with native plants or cover crop species.

MEMORANDUM

There was argument whether the Hearings Examiner's jurisdiction extends into mitigation of environmental impacts through consideration of the Final EA. The argument for is based upon the ruling of the Montana Supreme Court in MEIC v. DEQ, 296 Mont. 207, 229 988 P.2d 1236,1249 (1999), wherein the Court held that the 1972 Montana Constitution provides a constitutional right to a clean and healthful environment, stating in part that those protections were both "anticipatory and preventive," and further stating that, "Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." The argument against is that the only stated purpose of the hearing is whether the permit criteria are met:

"to determine whether a beneficial water use permit should be issued to Sunny Brook Colony for the above application under the criteria set forth in Mont. Code Ann. §85-2-311 (1999)."

What was not discussed, however, was the current Department administrative rules which state an EA may be used to develop conditions to be made part of a proposed action. Mont. Admin. R. 36.2.523(2)(b) and (d)(1988). In addition, Mont. Admin. R. 36.2.526(6)(c)(1988) states in part, "...the agency...shall...proceed in accordance with one of the following steps, as appropriate:...(c) determine that an EIS is not necessary and make a final decision on

the proposed action, with appropriate modification resulting from the analysis in the EA and analysis of public comment." (emphasis added).

Finally, Mont. Admin. R. 36.2.523 (2)(a) states in part, "An EA may serve to ensure that the agency uses the natural and social sciences and the environmental design arts in planning and decision-making" and that "[a]n EA may be used independently or in conjunction with other agency planning and decision-making procedures." (emphasis added).

It seems clear to me that the DNRC administrative rule provides for use of the EA, and the Kilpatrick case discussed below supports it. Thus, this Hearings Examiner sees the Department's responsibility in this matter to implement the DNRC rules it has set forth in conjunction with the provisions of the Water Use Act, Mont. Code Ann. §85-2-101 et seq. This Hearing Examiner interprets its administrative rules as complementing the permit criteria requirements of Mont. Code Ann. §85-2-311 (1999), as well as the legislature's policy statement at Mont. Code Ann. §85-2-101(3). That statute states in part:

It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems.

In Kilpatrick v. Vincent (No. BDV-93-637, First Judicial District, Lewis and Clark County) (1993), Judge Sherlock decided a case involving whether the Department of Fish, Wildlife and Parks (DFWP) could properly issue a game farm license and roadside zoo/menagerie permit with conditions attached as a result of the EA prepared on the application. In that case the plaintiffs submitted an application for a roadside zoo or menagerie permit for a bear park near Glacier Park.

Visitors would pay a fee to drive through the park and observe the bears. DFWP began preparing an EA to consider the environmental

impacts of issuing the permit. A public meeting on the draft EA was held and eleven proposed stipulations to mitigate impacts on the environment were discussed. Ultimately, the plaintiffs agreed to condition their permits with those stipulations as slightly revised and the permits were issued accordingly. Two years later the plaintiffs changed their minds and sued generally challenging the authority of DFWP to attach stipulations to its permits. The DFWP rules involved, Mont. Admin. R. 16.2.626, provide in part:

(2) An EA may serve any of the following purposes:...

(b) to assist in the evaluation of reasonable alternatives and the development of conditions, stipulations or modifications to be made a part of a proposed action...

(d) to ensure the fullest appropriate opportunity for public review and comment on proposed actions, including alternatives and planned mitigation, where the residual impacts do not warrant the preparation of an EIS.

Those DFWP administrative rules read exactly the same as DNRC's administrative rules found at Mont. Admin. R. 36.2.523(2)(b) and 523(2)(d). The district court recognized in its ruling that, "The FWP has never previously conducted an EA or an environmental impact statement when issuing permits such as the ones applied for by the Plaintiffs." Id. at 2. Judge Sherlock also recognized in his ruling that, "Neither the game farm statutes (Section 87-4-406 through 87-4-424, MCA), the zoo/menagerie statutes (Section 87-4-801, MCA), nor the regulations promulgated under the statutes specifically address the ability of FWP to attach conditions of any kind to these permits." Id. at 6. Despite both of those factors, Judge Sherlock reviewed the previously set out administrative rules and held:

The court finds that the issuance of either a game farm license or a roadside zoo/menagerie permit constitutes an "action" by the FWP as defined in ARM 16.2.625(1) [exactly the same as DNRC's 36.2.522]. The FWP acted entirely within its authority in

conducting an EA before issuing such permits to Plaintiffs, regardless of the fact that the FWP had neglected to conduct EA's for other permits issued prior to the Plaintiffs.

Clearly the regulations under MEPA provide that part of the purpose of an EA is to develop conditions and stipulations to mitigate the potential impact of an action on the environment. The FWP was well within the bounds of its authority to impose the eleven stipulations listed in the EA and attached to Plaintiffs' permits. The text of the EA and the testimony at the hearing provide evidence of FWP's concerns regarding the environmental effect of Plaintiffs' bear park and are a sound basis for the imposition of the stipulations on the permits.

Id. at 8.

Similarly in this case, the Final EA has identified potential environmental impacts. It also identified a preferred alternative action, and suggested mitigation measures which serve to minimize the identified environmental impacts. It is my task to recommend a final decision to the Department in the matter. In making my recommendation, I have relied on the Final EA testified about at the hearing to derive conditions that allow issuance of this permit pursuant to Mont. Code Ann. §85-2-311, but that also protect the environment as provided for by the preceding Department rules implementing MEPA, as well as the Water Use Act's policy statement at Mont. Code Ann. §85-2-101(3). The Kilpatrick case supports the Department's authority to so condition the permit in this case.

There was discussion at the hearing and in the *SUNNY BROOK COLONY IRRIGATION PROJECT FINAL ENVIRONMENTAL ASSESSMENT*, DNRC, October 2000 wanting to tie any water use permit that may issue to a contract for water from the Bureau of Reclamation for water from Tiber reservoir, Lake Elwell, when the cut-off flows are not met. This condition is not necessary to show the permit criteria are met. A contract may be necessary to allow the Applicant to appropriate when flows drop below the cut-off; but, that remains the Applicant's choice.

There was argument that using the biological demand flow (560 cfs) would be tantamount to granting DFWP a water right without due process. This is not true. Yes, the Applicant is limited in this permit to a cut-off flow based on the biological demand of 560 cfs; but, DFWP's trigger for a call on the source is 488.5 cfs, should DFWP so choose. There is no "phantom" water right here. Any water commissioner must administer the waters of the Marias River according to the water rights of record and as adjudicated. See State ex rel. Jones v. Fourth Judicial District, 283 Mont. 1, 938 P.2d 1312 (1997)

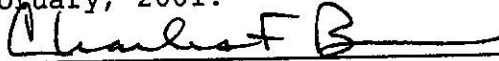
The DFWP's state water reservation is measured at the mouth of the Marias River. There is no gage there. When this gage becomes available, the Permit condition using the cut-off flow at the Tiber gage can be replaced with the cut-off based on the new gage. The cut-off level at the mouth of the Marias River for purposes of this order shall remain the biological flow demand (560 cfs until new techniques offer a better number) when the new gage is operational.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, briefs, and oral arguments, if requested.

Dated this 12th day of February, 2001.



Charles F. Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 12th day of FEBRUARY.

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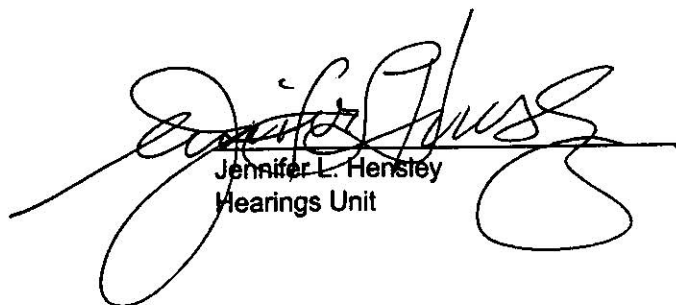
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